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PROCEEDINGS AND ORDERS

DATE

CASE NBR A7-1-00148 CFX
SHORT TITLE Lindsey, Hoover
VERSUS United States

DOCKETED: Jul 24 1987

| Date | Proceedings and Orders |
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| Jul 24 1987 | Petition for writ of certiorari filed. |
| Aug 27 1987 | Order extending time to file response to petition until September 28, 1987. |
| Sep 23 1987 | Brief of respondent United States in opposition filed. |
| Sep 30 1987 | Reply brief of petitioner Hoover Lindsey filed. |
| Sep 29 1987 | DISTRIBUTED. October 16, 1987 |
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| Nov 2 1987 | Petition DENIED. Dissenting opinion by Justice White with whom Justice Brennan joins. (Detached opinion. |

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# PETITION FOR WRIT OF CERTIORARI

87-148

No. ——



IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

HOOVER LINDSEY,
*Petitioner,*

v.

UNITED STATES OF AMERICA,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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## QUESTION PRESENTED

Whether a criminal defendant's rights to due process and confrontation are violated when the government forces an unindicted, alleged co-conspirator to invoke his privilege against self-incrimination in the presence of the jury, even though the government knows in advance that the witness will refuse to testify for the government.

## LIST OF PARTIES

The caption of the case contains the names of all parties.

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

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Hoover Lindsey hereby petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit in this case.

## OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-11a) is not reported.

## JURISDICTION

The judgment of the court of appeals was entered on April 17, 1987, and a petition for rehearing was denied on June 1, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution (U.S. Const., amend. V) provides, in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .

The Sixth Amendment of the United States Constitution (U.S. Const., amend. VI) provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . .

## STATEMENT

1. Petitioner was indicted and tried before a jury on one count of conspiracy to commit mail fraud and 35 counts of mail fraud in violation of 18 U.S.C. §§ 371, and 1341. App., *infra*, 1a. Petitioner was acquitted by the jury on seven counts and the district court entered a judgment of acquittal on 10 more counts. Tr. Vol. XV, 10-11; Tr. Vol. VI, 17. Petitioner was sentenced to concurrent three-year terms of imprisonment on the remaining counts on which he was convicted.

The indictment charged that petitioner, in conspiracy with Glen Lewis, Leon Vincent and Danny Vincent, committed mail fraud by submitting false tire adjustment and invoice documentation to the General Tire Company.[1] App., *infra*, 2a. Danny Vincent pled guilty

[1] An "adjustment" of a tire is a procedure by which the manufacturer reimburses a purchaser (through a dealer rebate or credit) for the depreciated value of the tire at the time that a defect in the tire is discovered. The amount of the adjustment, or depreciated value, is determined by measuring the tread wear at the time the tire is adjusted. The alleged fraud consisted of obtaining adjustments for tires that were not "adjustable" (*i.e.*, not defective) or falsifying the tread wear to obtain increased adjustments.



and was the government's key witness in the joint trial of Lewis, Leon Vincent and petitioner. *Id.*

Lindsey General Tire Services, Inc., which is wholly owned by petitioner, is a retail tire dealership which sells large or oversized tires manufactured by General Tire Corporation (GTC) for use on heavy equipment. *Id.* Lewis, a regional representative of GTC, inspected defective tires for dealers, including Lindsey General Tire, and prepared adjustment reports for GTC. *Id.* Those reports incorporated the dealer's invoice, which showed the purchase price of a new tire minus the adjustment credit (allowed to the retail customer) for the defective tire. *Id.* Lewis was required to prepare and forward such reports, together with a piece of the defective tire containing the tire's serial number, to GTC. *Id.* Upon receipt, GTC would issue the appropriate adjustment to the dealership. *Id.*

Evidence at trial showed that Danny Vincent participated in the fraud by obtaining discarded GTC tires in junk or salvage yards and taking them to Lindsey General Tire or Simpson County Tire, a separate GTC dealership which was operated by John Farley.[2] *Id.* At the dealership, Lewis would remove the serial numbers from the discarded tires to submit with fraudulent adjustment reports that he had prepared. App., *infra*, 2a-3a. Dennis Bull, petitioner's son-in-law and an employee of Lindsey General Tire, handled all of the adjustments of tires for the dealership. App., *infra*, 3a; Tr. VI, 114. Lewis submitted the fraudulent adjustment reports, together with fraudulent invoices prepared by Dennis Bull[3] and the

[2] The indictment alleged a scheme to defraud involving Lewis, Leon Vincent and Farley at Simpson County Tire identical to the scheme to defraud being operated through Lindsey General Tire. App., *infra*, 2a-3a. Farley, however, was not indicted.

[3] Several of the customers listed on the invoices testified that they had not signed the invoices on which their signature appeared

serial numbers provided by the Vincents. App., *infra*, 2a-3a.

The evidence supporting petitioner's participation in the scheme to defraud was minimal. Although he was the owner of Lindsey Tire Service, it was undisputed that Dennis Bull was the *only* individual at Lindsey Tire involved in the process of making adjustments.[4] Tr. Vol. XI, 132-33; Vol. VI, 114. Indeed, the primary witness in support of the prosecution's case against petitioner, Danny Vincent, admitted that he had never known petitioner to be involved in adjusting tires.[5] Tr. Vol. VI, 114. All of the other witnesses, including Glen Lewis, Dennis Bull and Leon Vincent, testified similarly that petitioner was not involved personally in the adjustment of GTC tires. Tr. Vol. VIII, 92; Vol. XI, 133; Vol. IX, 166. The district court stated:

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and that they had not received the rebates or credits reflected on the adjustment reports. App., *infra*, 3a.

[4] The court of appeals stated that "[Dennis] Bull testified that he had submitted adjustment documents evidencing *fraudulent* adjustments directly to Lindsey." App., *infra*, 4a (emphasis added). But this is a flagrant mischaracterization of the record: Bull testified only that the issue of whether certain tires would be adjusted at all was discussed with petitioner. Tr. Vol. XI, 133; Vol. XIII, 105-06. But, Bull did not suggest that petitioner participated or had knowledge of any *fraudulent* adjustments.

[5] The court of appeals also stated that "Danny Vincent further testified that on one occasion Lindsey telephoned him with instructions to deliver two used tires . . . *to be fraudulently adjusted* by Lewis." App., *infra*, 4a (emphasis added). This also is a clear distortion of the trial record. Danny Vincent testified only that petitioner on one occasion asked him to deliver two tires to the dealership. Tr. Vol. IV, 164, 174. Danny Vincent did not testify that petitioner in any way indicated that the tires were to be "fraudulently adjusted." On the contrary, when asked by the prosecution what petitioner had disclosed regarding the alleged "fraudulent adjustment," Danny Vincent stated: "Hoover never really told me anything except [he] just asked me to bring him tires once." Tr. Vol. V, 83.



> "I find that Mr. Hoover Lindsey does have a close question. . . . And in this case we did not have nearly the strong evidence against Hoover Lindsey that we did against the other parties, because Danny Vincent was the primary witness and he didn't really talk nearly as much about him as he did about everybody else." Tr. (Post Trial) Vol. II, 33.

The most powerful "evidence" from which the jury could have drawn an inference of petitioner's guilt was the fact that John Farley, owner and operator of Simpson Tire, claimed his Fifth Amendment privilege against self-incrimination when he was called to testify by the government. Farley's action in claiming the privilege was highly prejudicial to petitioner because Farley occupied the *same* position at Simpson Tire that petitioner occupied at Lindsey General Tire. App., *infra*, 7a-8a. Farley also was identified to the jury as a co-conspirator. Tr. Vol. XIV, 21. Thus, because of the parallel nature of the two conspiracies (at Simpson Tire and at Lindsey General Tire) and because of the parallel roles played by the two men, the jury was in essence invited to draw the inference of Lindsey's guilt from Farley's claim of privilege. What makes the government's tactics particularly questionable is that the prosecutor and district court both had been informed unequivocally that Farley would invoke his Fifth Amendment rights if called to the witness stand.[6] App., *infra*, 7a. Nevertheless, even after Farley invoked his Fifth Amendment right out-

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[6] Farley's attorney advised the court and prosecutor that Farley would invoke the Fifth Amendment privilege if called to testify. Tr. Vol. IV, 105, 143-44. Farley was called outside the presence of the jury and, after disclosing his name and place of residence, he invoked the Fifth Amendment. App., *infra*, 7a; Tr. Vol. IV, 117-21. When the jury was recalled, the prosecutor insisted on calling Farley, over defense counsel's vigorous objection. Tr. Vol. IV, 109, 116, 144. The court overruled the objection and allowed Farley to be called for the sole purpose of being required to invoke his Fifth Amendment privilege before the jury. Tr. Vol. IV, 140-44.

side the presence of the jury, he was forced to take the stand and repeatedly invoke the privilege in front of the jury. App., *infra*, 8a.

The district court rejected petitioner's objection to the use of Farley, holding that "the [prosecution] can [force invocation of the privilege], if it shows some prejudice by failing to present somebody . . . Otherwise [the jury] may draw an inference and wonder what happened to Mr. Farley or somebody else." App., *infra*, 8a; Tr. Vol. IV, 144. Thus, the court permitted the government to call Farley for the sole purpose of having him invoke his Fifth Amendment privilege in the presence of the jury. No testimony of any relevance[7] was anticipated or received from Mr. Farley.[8]

The district court, in allowing the government to call Farley for the purpose of invoking his Fifth Amendment privilege, recognized that a split in the circuits existed on this issue:

> Let me advise you about my ruling on the cases, because I did read all the cases that have been cited by the parties . . . . [T]he court agrees that language in two cases cited here by the defendant . . . do say in their language that . . . the government may not call any witness it knows will invoke the Fifth Amendment. However, *those are not Sixth Circuit cases.*

Tr. Vol. IV, 140 (emphasis added).

[7] Farley provided only his name and place of residence before invoking the privilege. Tr. Vol. IV, 149-50.

[8] Following Farley's "testimony," the court instructed the jury that it should "not take the invocation of the Fifth Amendment by this witness in any fashion with respect to the guilt or innocence of any defendant in this case." App., *infra*, 8a. It may be doubted whether this vaguely worded admonition was understood by the jury.

Moreover, even if the instruction were sufficiently clear and understandable, "it is doubtful whether such admonitions are not as likely to prejudice the interest of the accused as to help them, imposing, as they do, upon the jury a task beyond their powers: *i.e.*, a bit of 'mental gymnastics,' . . . which it is for practical purposes absurd to expect of them." *United States* v. *Maloney*, 262 F.2d 535, 538 (2d Cir. 1959).



In affirming petitioner's conviction, the court of appeals recognized that forcing a witness to invoke the privilege in front of the jury "is a practice . . . imbued with the 'potential for unfair prejudice,'" App., *infra*, 9a, quoting *United States* v. *Vandetti*, 623 F.2d 1144, 1147 (6th Cir. 1980) (citation omitted). Nevertheless, the court held that where the prosecution would be "seriously prejudiced" by a failure to present a witness, the district court should balance the probative value of the witness' appearance against the prejudicial effect of invoking the privilege in front of the jury. App., *infra*, 9a. Because the prosecution had an "honest belief" that Farley had relevant evidence which he would have provided (if the privilege had not been claimed)[9] and because the prosecution might have been "prejudiced" by Farley's absence, the court of appeals held that it "cannot conclude that the trial court committed reversible error when it permitted Farley to invoke his privilege

[9] With respect to the prosecution's "honest belief" that Farley would have provided relevant testimony that would have benefited the government if he had not claimed his Fifth Amendment privilege, it is undisputed that the government readily could have obtained Farley's testimony with a grant of immunity. As petitioner's counsel noted:

> I would just mention to the Court here that if the government is sincere in their request to get information from [Farley] . . . for purposes other than prejudicing these defendants in the presence of the jury, th[en] the government can get that information by a grant of immunity.

Tr. Vol. IV, 116. The court simply responded that while that option was "available," the court could not force the government to grant immunity. *Id.*

against self-incrimination in the presence of the jury." *Id.*

## REASONS FOR GRANTING THE PETITION

The Sixth Circuit has decided an issue of recurring and fundamental importance in the conduct of federal criminal trials in a way that conflicts with prior decisions of this Court, conflicts with the decisions of other courts of appeals and is manifestly unfair to criminal defendants. The court's "balancing test" ignores two well-established principles. First, a witness who provides no testimony other than a claim of privilege against self-incrimination will *not* provide any evidence of "probative value." See *United States* v. *Maloney*, 262 F.2d 535, 537 (2d Cir. 1959) (refusals to testify "uniformly held not to be a permissible basis for inferring what would have been the answer, although logically they are very persuasive"). Second, because the inference that arises when a witness claims the privilege is so logically persuasive, the inference will inevitably add weight to the prosecution's case in a form not subject to cross-examination and will always unfairly prejudice the defendant. See *Namet* v. *United States*, 373 U.S. 179 (1963). This Court should grant the petition and decide whether, in the absence of compelling circumstances, the prosecution should be permitted to call as a witness a co-conspirator who will do nothing more than assert his Fifth Amendment privilege in the presence of the jury.[10]

1. This Court first considered the effect of forced invocations of the Fifth Amendment privilege by witnesses

[10] "There are two constitutional problems which may arise when a witness is presented who refuses to testify relying upon the fifth amendment privilege." *United States* v. *Vandetti*, 623 F.2d 1144, 1148 (6th Cir. 1980). First, the party calling the witness may "build its case out of inferences arising from the use of the testimonial privilege . . . a violation of due process." *Id.* (citation omitted). Second, calling such a witness "encroaches upon the right to confrontation" because the witness cannot be cross-examined concerning the invocation of the privilege. *Id.*



in the jury's presence in *Namet* v. *United States*, 373 U.S. 179 (1963). In *Namet*, the defendant was convicted of violating the federal wagering tax laws in a jury trial in which his two codefendants, who had pled guilty, were forced to invoke their Fifth Amendment privilege before the jury. In analyzing the problem generally, the Court recognized two rationales for holding that the practice constitutes reversible error. First, there is the possibility of prosecutorial misconduct if the Government makes a "conscious and flagrant attempt to build its case out of inferences arising from use of the testimonial privilege." *Id.* at 186. Second, a witness' refusal to answer may enhance the government's case without the witness being subject to cross-examination, and this would unfairly prejudice the defendant. *Id.* at 187.

In *Namet*, "both [witnesses] possessed nonprivileged information" that supported the government's case. Thus, the "few invocations of privilege" by the witnesses were "minimized by the lengthy nonprivileged testimony which the [witnesses] gave." *Id.* at 189. Because the inferences arising from the claim of privilege were harmless (*i.e.*, did not add "critical weight" to the prosecution's case)[11] and because the defense counsel "*failed to object* on behalf of the defendant," the Court refused to find reversible error in the witnesses' forced invocation of the privilege. *Id.* (emphasis added).

The forced invocation of the self-incrimination privilege also was analyzed in *Douglas* v. *Alabama*, 380 U.S. 415 (1965). In *Douglas*, the state called as a witness a codefendant who had been tried separately and convicted. *Id.* at 416. After giving his name and address, the witness, who planned to appeal his conviction, refused to

[11] The Court noted that "the few claims of testimonial privilege were at most cumulative support for an inference already well established by the nonpriviliged portion of the witness' testimony." *Id.* at 189.

answer further questions and invoked his privilege against self-incrimination. *Id.* "Under the guise of cross-examination" the prosecution was allowed to question the witness regarding a prior confession, which implicated the defendant. *Id.* This "cross-examination" consisted of the prosecutor reading lengthy passages of the confession and then asking the witness whether he had made the statement previously quoted. *Id.* The witness consistently refused to answer based on his Fifth Amendment privilege. *Id.*

This Court held that, although the questions regarding the confession and the refusals to answer "were not technically testimony," the inference created by the questions and the corresponding claim of privilege would inevitably prejudice the jury. *Id.* at 419-20. Those "inferences from a witness' refusal to answer added critical weight to the prosecution's case in a form not subject to cross-examination, and thus unfairly prejudiced the defendant." [12] *Id.* at 420 (quoting *Namet*, 373 U.S. at 179). The conviction was reversed. 380 U.S. at 423.

*Namet* and *Douglas* provide the basic framework for analyzing the constitutionality of the government's effort to produce witnesses who will invoke their Fifth Amendment rights and thereby preclude cross-examination. In fact, *Namet* and *Douglas* represent polar extreme situations: in *Namet*, the witnesses provided relevant testimony which clearly outweighed their occasional claims of privilege; in *Douglas*, the witness provided no relevant evidence and the defendant's inability to cross-

[12] The Court in *Namet* was careful to note that the case before it involved only a "claim of evidentiary trial error" because "[n]o constitutional issues of any kind [were] presented" by the petitioner. 373 U.S. at 185. In *Douglas*, however, the Court expressly found that the manner in which the prosecution created an inference of guilt from the witness' refusal to answer "denied [the defendant] the right of cross-examination secured by the Confrontation Clause." 380 U.S. at 419.



examine was exacerbated by the prosecution's highly prejudicial use of the witness' prior statement. The present case obviously lies between these two extremes but is much closer to *Douglas:* the witness was intentionally called and placed before the jury for the *sole* purpose of requiring the witness to invoke his privilege against self-incrimination in open court. Thus, there was no relevant evidence provided and the prejudice was inherent in the fact that both the defendant and the witness had identical positions in different companies.

Under the standards developed in *Namet* and *Douglas*, the Sixth Circuit was clearly wrong in upholding the government's use of Farley against petitioner. Unlike *Namet*, the prosecution was fully aware that Farley would provide *no* probative evidence. There was no question that Farley was entitled to assert, and would in fact assert, his privilege with respect to *any* question asked except for his name and address. As *Douglas* makes clear, the negative inference raised against the defendant in such a circumstance is strong and virtually irrefutable; because of the claim of privilege, petitioner cannot cross-examine or elicit any information concerning the (potentially innocent or irrelevant) reason for the refusal to testify.[13] Thus, the prosecution was able to use Farley's

[13] As the D.C. Circuit recognized in its *en banc* decision in *Bowles* v. *United States*, 439 F.2d 536 (1970), *cert. denied*, 401 U.S. 955 (1971):

> The jury may think it high courtroom drama of probative significance when a witness "takes the Fifth." In reality the probative value of the event is almost entirely undercut by the absence of any requirement that the witness justify his fear of incrimination and by the fact that it is a form of evidence not subject to cross-examination.

439 F.2d at 541-42 (citations omitted). Nor is it reasonable to assume that a boiler-plate instruction to the jury not to draw any inference of guilt from the claim of privilege will eliminate the effect of the "high courtroom drama." Several courts that have addressed the issue have recognized that the prejudicial inference

claim of privilege to add "critical weight" to its weak case against petitioner in a manner that denied him his right of cross-examination secured by the Confrontation Clause of the Sixth Amendment and his right to a fair trial under the Due Process Clause of the Fifth Amendment.

The most striking element of the present case is that, unlike *Namet*, the prosecution had no reason to require the witness to assert his Fifth Amendment privilege in front of the jury *other than* to create a clearly impermissible inference concerning the witness' guilt and, by implication, petitioner's guilt. Under *Douglas*, the government's action was intolerable and therefore the decision below warrants review by the Court.[14]

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inherent in the invocation of the self-incrimination privilege is not dissipated by an admonition to "ignore" the inference. *United States* v. *King*, 461 F.2d 53, 57 n.4 (8th Cir. 1972) ("We do not consider this [cautionary instruction] sufficient protection to overcome the prejudicial harm created by the government in purposefully injecting into the trial this problem in the first place"); *see also Robbins* v. *Small*, 371 F.2d 793, 795-96 (1st Cir.), *cert. denied*, 386 U.S. 1033 (1967); *United States* v. *Ritz*, 548 F.2d 510, 520-21 (5th Cir. 1977). This Court also has recognized that a limiting instruction or admonition is not always sufficient to protect the accused against prejudicial testimony. *Cruz* v. *New York*, 107 S.Ct. 1714, 1717 (1987). *Bruton* v. *United States*, 391 U.S. 123, 128-37 (1968); *see Delli Paoli* v. *United States*, 352 U.S. 232, 248 (1957) (Frankfurter, J., dissenting) ("[t]he Government should not have the windfall of having the jury be influenced by evidence against a defendant which, as a matter of law, they should not consider but which they cannot put out of their minds").

[14] The prosecution's only claim was that the government might be prejudiced if Farley did not appear because the jury might question his absence and infer that his testimony would have been unfavorable to the government. But even if the government's concern were legitimate, there were obvious ways of addressing that problem without depriving the defendant of the right to confront the evidence against him.

As other courts have recognized, the most obvious means to alleviate the government's concern is for the court to provide a neutralizing instruction—"one calculated to reduce the danger that



2. In applying this Court's holdings in *Namet* and *Douglas*, the courts of appeals have developed varying standards for analyzing when, if ever, it is appropriate for the government, over a defendant's objection, to call a witness who will do nothing more than assert his privilege against self-incrimination. At least three other courts of appeals—the Fifth Circuit, the Eighth Circuit and the Ninth Circuit—have decided the issue presented in this case under legal standards which would result in a different outcome from that reached by the Sixth Circuit here.

As noted, *supra* p. 7, the Sixth Circuit essentially looks to two criteria in determining whether the prosecution may require a witness to invoke his Fifth Amendment privilege in open court. First, the prosecution must act in "good faith," *i.e.*, the witness must have "information which is pertinent to the issues in the case and [which would be admissible] if no privilege were claimed." App., *infra*, 8a; see also *United States* v. *Vandetti*, 623 F.2d 1144, 1148 (6th Cir. 1980); *United States* v. *Kilpatrick*, 477 F.2d 357, 360 (6th Cir. 1973); *United States* v. *Compton*, 365 F.2d 1, 5 (6th Cir.), *cert. denied*, 385 U.S. 956 (1966). If so, then the court simply applies the basic standard in Fed. R. Evid. 403, *i.e.*, whether the "probative value of the proffered evidence is substantially outweighed by the danger of unfair preju-

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the jury will in fact draw an inference from the absence of such a witness." *Bowles*, 439 F.2d at 542; *see also United States* v. *Martin*, 526 F.2d 485, 486-87 (10th Cir. 1975). In addition to such an instruction (or in place of it), the court may instruct counsel for both sides to avoid mention of the witness and preclude any argument regarding inferences to be drawn from the witness' absence. *United States* v. *Maloney*, 262 F.2d 535, 537-38 (2d Cir. 1959). Regardless of the exact wording of any instruction, it is clear that the Sixth Circuit's solution—eliminating the "missing witness" inference against the government by creating a highly prejudicial and irrefutable inference of guilt on the part of the defendant—is the worst possible "remedy" and is contrary to this Court's reasoning in *Namet* and *Douglas*.

dice." *Vandetti*, 623 F.2d at 1149; App., *infra*, 9a. Thus, the Sixth Circuit treats the witness' forced invocation of a Fifth Amendment privilege as if it were no different than any other evidence, and the court places the burden on the defendant to show that the possible prejudice outweighs the government's need for the evidence. The defendant's right of confrontation is given no special protection.

The Fifth Circuit, by contrast, gives no weight to the government's interest in having a witness claim the privilege in open court:

> [W]e are at a loss to see any purpose for having this drama played out before the jury other than that of having the jury draw inferences from [the witness'] refusal to answer the questions. Such inferences are, of course, not permitted but they exist . . . .

*United States* v. *Ritz*, 548 F.2d 510, 519 (5th Cir. 1977): see *San Fratello* v. *United States*, 340 F.2d 560, 565 (5th Cir. 1965) ("[t]here is nothing about the government's right to have a witness claim his privilege in response to specific questions while on the stand under oath that requires it to be done in the presence of the jury"). The Fifth Circuit instead has recognized that whenever the witness is "closely associated with the accused," the possibility of an improper inference of guilt is so high that, in the face of a timely objection, the testimony of the witness (who the prosecution believes will claim the privilege) generally should be taken outside the presence of the jury. See *Ritz*, 548 F.2d at 520-21. Rather than "weighing" the admissibility of this evidence, the Fifth Circuit has concluded that the strong likelihood of prejudice [15] will inevitably outweigh the non-

[15] The Fifth Circuit has held that the improper inference arising from the claim is so strong that the resulting prejudice requires a new trial even where the testimony is stricken and the jury instructed to ignore it. *Ritz*, 548 F.2d at 520-21.



existent government interest in forcing the claim of privilege in open court.

Similarly, the Eighth Circuit has held that it is plain error for the government to call witnesses for no purpose "other than in forcing them to take the privilege in a manner obviously prejudicial to the defendant." *United States* v. *King*, 461 F.2d 53, 56 n.2, 57 (8th Cir. 1972). In *King*, as in the instant case, the government's error was particularly egregious because "the evidence supporting conviction [was] not strong." *King*, 461 F.2d at 57. In such a case, "there can be little doubt of the prejudicial atmosphere created . . . ." *Id.*

The Ninth Circuit also has generally disapproved of the practice of "questioning a witness before the jury after he has indicated that he will decline to testify . . . ." *United States* v. *Roselli*, 432 F.2d 879, 903-04 (9th Cir. 1970), *cert. denied*, 401 U.S. 924 (1971).[16] Instead, that court has held that the proper response when a prosecution witness indicates that he will not testify is for the court to present *no* testimony or instruction to the jury. Only if "the defense seeks to exploit the situation to its advantage," is it then proper for the prosecution to dis-

[16] Although the prosecution practice in *Roselli* was deemed to be improper, the court of appeals believed that the error did not require reversal because the improper inferences did not add "critical weight" to the "abundant evidence" already produced. The incidents in question involved only "a few moments in a six-month trial." *Roselli*, 432 F.2d at 903. Compare *Sanders* v. *United States*, 373 F.2d 735, 735-36 (9th Cir. 1967) (reversal required where inferences from refusal to answer added critical weight to prosecution's case) with *Cota* v. *Eyman*, 453 F.2d 691, 694-95 (9th Cir. 1971), *cert. denied*, 406 U.S. 949 (1972) (affirming denial of petition for habeas corpus where, despite "troubling" practice of requiring witness to "take the Fifth" in presence of jury, impact of incident was minimal and no critical weight added to state's case). Here, of course, the obvious inferences drawn from Farley's invocation of the privilege were crucial to bolstering the government's weak case against petitioner.

close that the witness has refused to testify. *Id.* at 904, citing *United States* v. *Maloney*, 262 F.2d 535, 537 (2d Cir. 1959).

It is also clear that other courts of appeals have rejected all or part of the "good faith" and "balancing" tests adopted by the Sixth Circuit. For example, the First Circuit has held that the prosecution's knowledge of the witness' intent or lack of improper motive is irrelevant to the analysis of the issue. See *Robbins* v. *Small*, 371 F.2d 793, 795 (1st Cir.), *cert. denied*, 386 U.S. 1033 (1967); *cf. Frazier* v. *Cupp*, 394 U.S. 731, 736 (1969) ("prosecutor's good faith, or lack of it" not controlling in determining whether Confrontation Clause violated).

Other courts, while not denying the prosecution's legitimate interest in avoiding any inference from a "missing" witness, recognize that an appropriate instruction to the jury regarding the witness' absence avoids having to "balance" the prejudice to the defendant against the prejudice to the government. See *United States* v. *Maloney*, 262 F.2d 535, 537-38 (2d Cir. 1959); *Bowles* v. *United States*, 439 F.2d 536, 542 (D.C. Cir. 1970), *cert. denied*, 401 U.S. 955 (1971). Their approach stands in stark contrast to that of the Sixth Circuit, which simply ignores the constitutional magnitude of the defendant's interest in keeping the invocation of the privilege out of the case.

It is clear that under the analyses followed in several courts of appeals (most plainly the Fifth, Eighth and Ninth Circuits), Farley would never have been permitted to testify at petitioner's trial and thus the most damaging "evidence" presented by the government against petitioner would have been excluded. In light of the paucity of the government's evidence against petitioner, this error was clearly not harmless beyond a



reasonable doubt and therefore this case warrants review by this Court.[17]

* * * * *

The court of appeals clearly misread this Court's decisions in *Namet* and *Douglas*. Moreover, the reasoning of the Sixth Circuit contrasts sharply with the analyses followed by other courts of appeals, which have recognized the importance of the defendant's interest in not having prejudicial "evidence" admitted, which cannot be subjected to any cross-examination. At bottom, the Sixth Circuit's decision allows a prosecutor knowingly to call a witness for the *sole* purpose of having that witness claim his Fifth Amendment privilege against self-incrimination in front of the jury. Although that claim of privilege has no actual probative value, it clearly creates an improper inference against the defendant. Moreover, that inference is not subject to cross-examination and therefore the practice violates the Confrontation Clause of the Sixth Amendment and the Due Process Clause of the Fifth Amendment. This Court should grant the petition in order to resolve the conflicting approaches

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[17] What makes the rule in the Sixth Circuit anomalous is that most courts have held that the *defendant* may not call a witness who will refuse to testify on Fifth Amendment grounds. *See Bowles*, 439 F.2d at 542 (the "rule [is] that a witness should not be put on the stand for the purpose of having him exercise his privilege before the jury"); *United States* v. *Martin*, 526 F.2d 485, 487 (10th Cir. 1975); *United States* v. *Lacouture*, 495 F.2d 1237, 1240 (5th Cir.), *cert. denied*, 419 U.S. 1053 (1974) ("[n]either side [the prosecution or defense] has the right to benefit from any inference the jury may draw simply from the witness' assertion of the privilege"); *United States* v. *Beye*, 445 F.2d 1037, 1038 (9th Cir. 1971); *United States* v. *Johnson*, 488 F.2d 1206, 1211 (1st Cir. 1973). In light of the recognized Confrontation Clause problem that results when the prosecution calls a witness who asserts his Fifth Amendment privilege, it is at least odd that the prosecution—but not the defense—will usually be allowed to call such a witness. *See Bowles*, 439 F.2d at 541-42; *Cota*, 453 F.2d at 697 (Browning, J., dissenting).

of the courts of appeal on this issue and to reaffirm the basic holdings of the Court in *Namet* and *Douglas*.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 24, 1987

# APPENDIX

**APPENDIX**

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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Nos. 86-5377/5379

UNITED STATES OF AMERICA,
*Plaintiff-Appellee,*

v.

GLENN R. LEWIS (86-5377) AND
HOOVER LINDSEY (86-5379),
*Defendants-Appellants.*

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On Appeal From The United States District Court
For The Western District Of Kentucky

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Decided and filed April 17, 1987

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BEFORE: KEITH, KRUPANSKY and GUY, Circuit Judges.

PER CURIAM. Defendants-appellants Hoover Lindsey (Lindsey) and Glen Lewis (Lewis) appealed their convictions of numerous counts of mail fraud and one count of conspiracy to commit mail fraud, in violation of 18 U.S.C. § 371 and 1341-42.

The record disclosed the following facts. Lindsey, Lewis, Danny Vincent and Leon Vincent were indicted in the Western District of Kentucky on 35 substantive counts

of mail fraud and one count of conspiracy to commit mail fraud. Danny Vincent pled guilty and became the government's key witness in the joint trial which began on February 3, 1986 and lasted until February 28, 1986.

The charges involved a scheme to fraudulently "adjust" tires to exact monetary rebates from the manufacturer.[1] Lindsey General Tire Service, Inc., a corporation wholly owned by Lindsey, operated a tire dealership which sold "giant tires" manufactured by General Tire Corporation (GTC) for use on heavy equipment. The purchase price of tires that had failed because of a design defect or accelerated wear was "adjusted" by GTC. Lewis, a representative of GTC assigned to the geographical area in which Lindsey General Tire was located, inspected defective tires and prepared adjustment reports for GTC. The reports incorporated the dealer's invoice listing the purchase price of a new tire less the adjustment credit allowed for the defective tire. Lewis was required to identify each tire adjusted by cutting the serial number from it and forwarding it to GTC with each report. Upon receipt of a report, GTC would issue a credit to the dealer who sold the tire, who in turn was required to credit the customer's account or rebate the cash for the adjusted amount.

Danny Vincent's participation in the scheme was to locate GTC manufactured discarded giant tires in junk yards, salvage yards, etc., that had been sold within the preceeding five years, which he identified from a confidential GTC list of coded serial numbers supplied by Lewis. The discarded tires were taken to Lindsey General Tire or Simpson County Tire, another tire dealership in the area operated by John Farley (Farley), where they were subsequently adjusted by Lewis who

[1] An "adjustment" of a defective tire is a procedure whereby the manufacturer reimburses the purchaser the depreciated value of the tire determined by the tread wear at the time that the defect was discovered.



removed the serial numbers from the tires for attachment to his adjustment report to GTC.

Dennis Bull, Lindsey's son-in-law who was employed by Lindsey General Tire, prepared fraudulent invoices that reflected ficticious tire sales to customers which were attached to Lewis' fraudulent adjustment reports that were forwarded to GTC in Akron, Ohio. GTC paid Lindsey General Tire or Simpson County Tire from $1,000 to $3,000 for each tire depending upon its adjusted fictitious depreciated value. Lewis, Danny Vincent, Leon Vincent, Lindsey General Tire and/or Simpson County Tire all received a pro rata share from each GTC rebate. GTC calculated its losses from the fraudulent credits resulting from the conspiracy at $179,342.42.

To support each of the substantive counts, the prosecution introduced into evidence the adjustment reports and respective GTC credit memos for each of the fraudulent adjustments. Several of the "customers" named on the fraudulent invoices testified that they had not signed or authorized their signature which appeared on the controversial invoices or received any of the rebates that may have resulted from the ficticious transaction.

The jury convicted each defendant of the conspiracy count and of numerous substantive counts. Lewis and Lindsey initiated separate appeals which were consolidated for consideration and disposition.

Lindsey argued initially that the evidence was insufficient to support his conviction of either the conspiracy count or of the underlying 18 substantive counts of the indictment for which he was convicted. A court reviewing a criminal conviction must determine if "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781,

2789, 61 L.Ed.2d 560 (1979) (emphasis in original). In order to support a conviction for conspiracy, the government must prove beyond a reasonable doubt that a conspiracy existed and that "each alleged member agreed to participate in what he knew to be a collective venture directed toward a common goal." *United States v. Warner*, 690 F.2d 545, 549 (6th Cir. 1982) (citation omitted). *See also United States v. Richardson*, 596 F.2d 157, 162 (6th Cir. 1979).

Lindsey did not challenge the existence of a conspiracy, but rather challenged only the sufficiency of the evidence that implicated him in it. There was substantial evidence, however, to prove Lindsey's participation in the objectives of the conspiracy. He was the owner of the dealership which received the payments from GTC from the scheme. Bull testified that he had submitted adjustment documents evidencing fraudulent adjustments directly to Lindsey. Danny Vincent testified that he overheard Lindsey and Lewis arguing over allocating the receipts derived from the scheme. Danny Vincent further testified that on one occasion Lindsey telephoned him with instructions to deliver two used tires to Lindsey General Tire to be fraudulently adjusted by Lewis.

In considering the substantive counts, this court is reminded that "[t]he essential elements of mail fraud . . . are (1) a scheme to defraud and (2) the mailing of material for the purpose of executing the scheme." *United States v. Stull*, 743 F.2d 439, 441-42 (6th Cir. 1984), *cert. denied*, 470 U.S. 1062, 105 S.Ct. 1779, 84 L.Ed.2d 838 (1985). The record disclosed that the prosecution introduced into evidence each fraudulent invoice Lindsey General Tire had submitted to GTC. It also introduced evidence documenting GTC's authorization of credit rebates which resulted from the scheme to Lindsey General Tire which it retained as income. In addition, much of the same evidence which linked Lindsey to the



conspiracy also supported his conviction on the substantive counts.[2]

Lindsey next asserted that the district court abused its discretion in not granting his motion for severance.

> [I]t is clear that a motion for severance of defendants is committed to the sound discretion of the trial court. A general rule in conspiracy cases is that persons jointly indicted should be tried together. This is particularly true where the offenses charged may be established against all of the defendants by the same evidence. The appellants, therefore, have the burden of showing that they were prejudiced by the court's denial of the severance motion.

*United States v. Robinson*, 707 F.2d 872, 879 (6th Cir. 1983) (citations omitted). "Even if defendant may establish some potential jury confusion, this must be balanced against society's need for speedy and effective trials." *United States v. Gallo*, 763 F.2d 1504, 1525 (6th Cir. 1985) (citations omitted), *cert. denied*, 106 S.Ct. 826, 88 L.Ed.2d 798, *cert. denied*, 106 S.Ct. 828, 88 L.Ed.2d 800, *cert. denied*, 106 S.Ct. 1200, 89 L.Ed.2d 314 (1986). "A defendant has no right to a separate trial merely because his likelihood of acquittal would be greater if severance were granted." *Id.* at 1526 (citation omitted). Because "the jury must be presumed capable of sorting out the evidence and considering the cases of each defendant separately," *United States v. Thomas*, 728 F.2d

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[2] Lindsey also challenged the validity of the court's jury instruction concerning the intent element of mail fraud. To prevail in a mail fraud action, the government had the burden of proving intent to defraud beyond a reasonable doubt. *United States v. Goodpaster*, 769 F.2d 374, 377 (6th Cir.), *cert. denied*, 106 S.Ct. 391, 88 L.Ed.2d 343 (1985). In this case, the trial court instructed the jury that in order to convict the defendants, it had to find that they had "wilfully and knowingly devised or . . . intended to devise a scheme or artifice to defraud [GTC]," and that they used the mails "for the purpose of executing the scheme to defraud." This court finds no error in the instruction.

313, 319 (6th Cir. 1984) (citations omitted), and because Lindsey failed to demonstrate that the jury was unable to do so, this court finds no abuse of discretion in the denial of the motion for severance.

Lindsey also argued that the district court erred in denying his motion for a continuance. He had moved for a continuance on the morning of the first day of trial after the government had provided defense counsel with a summary of the anticipated testimony of its witness Frank Herema (Herema), a GTC audit manager. The summary indicated that Herema intended to document adjustments on at least fifty tires not included in the indictment, and that the government would seek to introduce those documents as evidence of similar acts. Although the documents were in Lindsey's possession, the government had not communicated its intent to use them as evidence in its case in chief until the morning of the first day of trial giving rise to Lindsey's charge that this "last minute" disclosure violated the discovery provisions of Fed.R.Crim.P. 16(a)(1)(C)[3] and the district court's earlier discovery order,[4] and prohibited him from adequately preparing for his defense.

Precedent in this circuit has concluded that:

> [t]he denial of a motion for a continuance will not be reversed absent a clear abuse of discretion. Denial amounts to a constitutional violation only if there is an unreasoning and arbitrary "insistence upon expeditiousness in the face of a justifiable request for delay." To demonstrate reversible error, the defendant must show that the denial resulted in actual prejudice to his defense.

*Gallo*, 763 F.2d at 1523 (quoting *United States v. Mitchell*, 744 F.2d 701, 704 (9th Cir. 1984)).

[3] Fed. R. Crim. P. 16(a)(1)(C) provides:

> (C) Documents and Tangible Objects. Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of his defense or are intended for use by the government as evidence in chief at trial, or were obtained from or belong to the defendant.

[4] The court's discovery order essentially mirrored the disclosure requirements of Fed. R. Crim. P. 16.



This assignment of error is misplaced. The documents which the government proffered were in Lindsey's possession so he was fully aware of their content and implications. Furthermore, the district court prohibited use of the documents in the government's case in chief, and they were withheld by the prosecution until its cross-examination of Lewis on February 14, 1986, a full 13 days after the prosecution indicated that it intended to use them.

As his next assignment of error, Lindsey asserted that the district court, over objection, improperly permitted the government to present Farley, owner and operator of Simpson County Tire, as a witness when it was aware that he would invoke his Fifth Amendment privilege against self incrimination in the jury's presence. Farley, Lewis, and Danny and Leon Vincent, and Lindsey engaged in the same common conspiracy to fradulently exact rebates from GTC using both Simpson County Tire and Lindsey Tire as instruments to promote the scheme. During a discussion outside the presence of the jury, the prosecution informed the district court that Farley possessed information concerning the procedural operation of the conspiracy and the contribution of each of the various participants in furthering the scheme. Farley's attorney advised the court that his client intended to invoke his Fifth Amendment privilege, which Farley proceeded to do upon voir dire examination. The court, nevertheless, overruled defense counsel's objection and permitted Farley to appear as a witness, explaining its decision in the following colloquy:

> THE COURT: Well, . . . the U.S. can, if it shows some prejudice by failing to present somebody, if they want to show that they are bringing in people that know about the facts of the case, they may do so. Otherwise they [the jury] may draw an inference and wonder what happened to Mr. Farley or somebody else.

After disclosing his name and place of residence, Farley in the presence of the jury invoked his Fifth Amendment privilege in response to a limited interrogation concerning his association with Simpson County Tire and certain tire invoices. Defense counsel proffered no questions, and the court immediately cautioned the jury:

> THE COURT: Now, ladies and gentlement of the jury, let me advise you that since the invocation of the Fifth Amendment under the Constitution is a personal right, you will not take the invocation of the Fifth Amendment by this witness in any fashion with respect to the guilt or innocence of any defendant in this case.

In a similar case, this circuit has held that:

> Government counsel need not refrain from calling a witness whose attorney appears in court and advises court and counsel that the witness will claim his privilege and will not testify. However, to call such a witness, counsel must have an honest belief that the witness has information which is pertinent to the issues in the case and which is admissible under applicable rules of evidence, if no privilege were claimed. It is an unfair trial tactic if it appears that counsel calls such a witness merely to get him to claim his privilege before the jury to a series of questions not pertinent to the issues on trial or not admissible under applicable rules of evidence.

*United States v. Compton*, 365 F.2d 1, 5 (6th Cir.), *cert. denied*, 385 U.S. 956, 87 S.Ct. 391, 17 L.Ed.2d 303



(1966): "This court has cautioned, however, that it is a practice so imbued with the 'potential for unfair prejudice' that a trial judge should closely scrutinize any such request." *United States v. Vandetti*, 623 F.2d 1144, 1147 (6th Cir. 1980) (citation omitted). However, the government has been permitted in some instances to present a witness who it knows will invoke his Fifth Amendment privilege where "the prosecution's case would be seriously prejudiced by a failure to offer him as a witness." *United States v. Kilpatrick*, 477 F.2d 357, 360 (6th Cir. 1973). *See also Vandetti*, 623 F.2d at 1147.

The trial court in this case, after balancing the probative value of the procedure against its prejudicial affect, decided to accomodate the governments request. The prosecution interrogated Farley by asking him a total of five questions, none of which alluded to the guilt or innocence of any of the defendants in this case. *See Vandetti*, 623 F.2d at 1147 ("In the most extreme case, presentation of such a witness is obviously unfair, as when there is extensive questioning after the prosecutor knew that the privilege would be asserted.") (citation omitted). The court immediately at the conclusion of Farley's appearance gave a cautionary instruction advising the jury not to consider Farley's action as bearing upon the guilt or innocence of any of the defendants. Under such circumstances, this court cannot conclude that the trial court committed reversible error when it permitted Farley to invoke his privilege against self-incrimination in the presence of the jury.

Lindsey next challenged the admission of a statement attributed to Bull[5] under the coconspirator exception to the hearsay rule which provides that "[a] statement is not hearsay if—. . . [t]he statement is offered against a party and is . . . a statement by a coconspirator of a

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[5] Danny Vincent testified that Bull introduced Lewis to Danny and Leon Vincent as "the man that can make us a lot of money. . . ."

party during the course of and in furtherance of the conspiracy." Fed.R.Evid. 801(d)(2)(E). Lindsey argued that the statement could not have been made in the course of and in furtherance of the charged conspiracy because it was made over a year before the conspiracy, charged in the indictment, was formed. The government's proof, however, established that a conspiracy existed prior to the time alleged in the indictment, and "[a]n otherwise admissible declaration of one coconspirator is admissible against members of the conspiracy who joined after the statement was made." *United States v. Holder*, 652 F.2d 449, 451 (5th Cir. 1981) (citation omitted). Thus, even if Lindsey did not become a member of the conspiracy until the time charged in the indictment, the statement was properly admitted against him.

Lindsey and Lewis both attacked the district court's admission under Fed.R.Evid. 404(b)[6] of evidence of "other crimes, wrongs, or acts" which were not charged in the indictment. In particular, they challenged the admission of evidence concerning the theft of innertubes from GTC and a similar adjustment scheme in Macon, Georgia. The innertube evidence was admitted to prove Lewis' knowledge of and intent to steal from GTC, and the Macon evidence was admitted to prove Leon Vincent's knowledge and intent.[7] Fed.R.Evid. 404(b) ex-

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[6] Fed. R. Evid. 404(b) provides:

> (b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

[7] Leon Vincent was involved in the Macon adjustment scheme. Lewis and Lindsey were not.



pressly permits the introduction of uncharged misconduct evidence for this purpose, and the district court in this case determined that the probative value of the evidence was not substantially outweighed by its possible prejudicial effect. The ruling did not constitute a clear abuse of discretion. *See Geisler v. Folsom*, 735 F.2d 991, 997 (6th Cir. 1984) (evidentiary rulings "may not be disturbed on appeal in the absence of a showing of clear abuse of discretion.")

This court, having examined the defendants' remaining assignments of error, concludes that each is without merit. Accordingly, the judgment of the district court is hereby AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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No. 86-5379

UNITED STATES OF AMERICA,
*Plaintiff-Appellee,*

v.

HOOVER LINDSEY,
*Defendant-Appellant*

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[Filed June 1, 1987]

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ORDER

BEFORE: KEITH, KRUPANSKY and GUY, Circuit Judges

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
JOHN P. HEHMAN
Clerk

# OPPOSITION

# BRIEF

No. 87-148



# In the Supreme Court of the United States

OCTOBER TERM, 1987

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HOOVER LINDSEY, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

---

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether petitioner was denied a fair trial when the prosecutor, in the jury's presence, briefly questioned a witness who invoked his privilege against compulsory self-incrimination.

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# In the Supreme Court of the United States

OCTOBER TERM, 1987

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No. 87-148

HOOVER LINDSEY, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

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**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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## OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 816 F.2d 683 (Table).

## JURISDICTION

The judgment of the court of appeals was entered on April 17, 1987. A petition for rehearing (Pet. App. 12a) was denied on June 1, 1987, and the petition for a writ of certiorari was filed on July 24, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

After a jury trial in the United States District Court for the Western District of Kentucky, petitioner was convicted on 18 counts of mail fraud (18 U.S.C. 1341) and one count of conspiracy to commit mail fraud (18 U.S.C. 371).[1] He

[1] Petitioner was acquitted by the jury on seven other mail fraud counts, and the trial court entered a judgment of acquittal on an addi-

was sentenced to concurrent three-year terms of imprisonment on all counts. The court of appeals affirmed (Pet. App. 1a-12a).

1. Petitioner owned Lindsey General Tire Service, Inc., a tire dealership that sold "giant tires" manufactured by General Tire Corporation (GTC) for use on heavy equipment (Pet. App. 2a). Customers who purchased giant tires could receive rebates from GTC if a tire failed during the warranty period. Co-defendant Glen Lewis was the regional service adjuster for GTC; in order for an adjustment to be given, Lewis had to approve the claim, cut the serial number from the tire, and forward it to GTC together with a dealer's invoice reflecting the terms of the sale to the customer. *Ibid.*

The evidence at trial showed that petitioner—together with co-defendants Lewis, Leon Vincent, and Danny Vincent, and co-conspirator Dennis Bull—conspired to exact unjustified adjustments from GTC by submitting false documentation through the mails. Lewis would give co-defendant Danny Vincent a confidential GTC list of serial numbers of tires manufactured within the previous five years. Using that list, Vincent would canvass junk yards, salvage yards, and other areas to obtain discarded giant tires. Vincent would then transport the tires to petitioner's store. Dennis Bull, petitioner's son-in-law and an employee at petitioner's dealership, would prepare invoices reflecting fictitious sales of the tires and would provide those documents to petitioner. Lewis would then approve adjustments for the tires and forward the requisite documents to GTC for payment. Pet. App. 2a-3a.

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tional ten mail fraud counts. Three co-defendants were indicted with petitioner. Danny Vincent pleaded guilty prior to trial and testified for the government. Glen R. Lewis and Leon Vincent stood trial with petitioner and likewise were convicted of conspiracy and numerous substantive counts. Lewis's conviction was thereafter affirmed by the court of appeals in the same opinion that affirmed petitioner's conviction (Pet. App. 1a-11a)



2. At trial, the government called as a witness unindicted co-conspirator John Farley, the owner of Simpson County Tire, a tire dealership that had operated the same scheme as petitioner's company. At a hearing outside the jury's presence, the prosecutor told the trial judge that Farley could provide details about the operation of the conspiracy, including the particular role of each of the defendants. Farley's lawyer advised the court that Farley would claim his Fifth Amendment privilege against compulsory self-incrimination if he was questioned about the scheme. When examined on voir dire, Farley invoked the Fifth Amendment. Pet. App. 7a.

Over petitioner's objection, the court ruled that the prosecutor could call Farley as a witness to ensure that the jury did not assume that the government was trying to conceal Farley's testimony. In the jury's presence, Farley gave his name and address but invoked his Fifth Amendment privilege in response to five questions dealing with his association with Simpson County Tire and certain tire invoices. Pet. App. 7a-9a. The trial court then instructed the jury as follows (*id.* at 8a):

> Now, ladies and gentlement [*sic*] of the jury, let me advise you that since the invocation of the Fifth Amendment under the Constitution is a personal right, you will not take the invocation of the Fifth Amendment by this witness in any fashion with respect to the guilt or innocence of any defendant in this case.

3. The court of appeals affirmed (Pet. App. 1a-11a; 816 F.2d 683 (Table)). The court stated (Pet. App. 8a (citation omitted)) that " '[g]overnment counsel need not refrain from calling a witness whose attorney appears in court and advises court and counsel that the witness will claim his privilege and not testify.' " It cautioned, however (*ibid.* (citation omitted)), that " 'to call such a witness, counsel must have an honest belief that the witness has in-

formation which is pertinent to the issues in the case and which is admissible under applicable rules of evidence, if no privilege were claimed.' " Because the practice is " 'so imbued with the "potential for unfair prejudice," ' " the court explained that " 'a trial judge should closely scrutinize any such request' " (*id.* at 9a (citation omitted)). Examining the record, the court held (*ibid.*) that the procedure used in this case had not had an unduly prejudicial effect on petitioner. It noted that the prosecutor had asked Farley only five questions, none of which alluded to the guilt or innocence of any of the defendants on trial. Moreover, the trial court gave a cautionary instruction advising the jury not to consider Farley's action as bearing upon the guilt or innocence of any of the defendants. Under those circumstances, the court concluded that the trial court did not commit reversible error when it permitted Farley to invoke his privilege against compulsory self-incrimination in the presence of the jury. *Ibid.*[2]

**ARGUMENT**

1. Petitioner first contends (Pet. 8-12) that the court of appeals' decision is at odds with this Court's decisions in *Namet* v. *United States*, 373 U.S. 179 (1963), and *Douglas* v. *Alabama*, 380 U.S. 415 (1965).

a. In the *Namet* case, the prosecutor called two witnesses to testify about their dealings with the defendant in a gambling ring. Prior to their testimony, defense counsel, who also represented the two witnesses, apprised

[2] The court of appeals also held that the evidence linking petitioner with the conspiracy was sufficient (Pet. App. 3a-5a); that the trial court did not abuse its discretion in denying petitioner's motions for a severance (*id.* at 5a-6a) and for a continuance (*id.* at 6a-7a); and that both a co-conspirator statement and certain "other crimes" evidence had been properly admitted at trial (*id.* at 9a-11a). The petition does not present those issues.



the court and the prosecutor that the witnesses intended to invoke their privilege against compulsory self-incrimination. The trial court, concluding that the witnesses were not entitled to invoke that privilege, permitted the prosecutor to call them to the stand. Each witness answered certain questions pertaining to the gambling ring and to his association with the defendant, but refused to answer other questions concerning the defendant's operation. Affirming the defendant's conviction, this Court rejected the proposition (373 U.S. at 186) "that reversible error is invariably committed whenever a witness claims his privilege not to answer." Instead, the Court stated (*id.* at 186-187), a reviewing court must look to the surrounding circumstances in each case. The Court identified two possible grounds for finding reversible error in particular cases. First, the Court explained, "some courts have indicated that error may be based upon a concept of prosecutorial misconduct, when the Government makes a conscious and flagrant attempt to build its case out of inferences arising from use of the testimonial privilege." A second theory, the Court observed, "seems to rest upon the conclusion that, in the circumstances of a given case, inferences from a witness' refusal to answer added critical weight to the prosecution's case in a form not subject to cross-examination, and thus unfairly prejudiced the defendant." The Court concluded that neither of those factors was present in the case before it. It explained, first (*id.* at 188), that the record did not support any inference of prosecutorial misconduct: although the witnesses had declared their intention to refuse to testify, the prosecutor had an "independent and quite proper reason to call the [witnesses]," in that they had relevant, unprivileged testimony to offer. Moreover, the Court could not find that a "few lapses, when viewed in the context of the entire trial, amounted to planned or deliberate attempts by the Government to make capital out of witnesses' refusals to

testify" (*id.* at 189). Finally, in light of the other evidence at trial, including the unprivileged portions of the witnesses' testimony, the Court held (*ibid.*) that the "few invocations of privilege by [the witnesses]" were not "of such significance in the trial that they constituted reversible error even in the absence of prosecutorial misconduct."

The court of appeals' decision in the present case is entirely consistent with this Court's decision in *Namet*. The court cautioned in this case that the proposed questioning of Farley must be " 'closely scrutinize[d]' " (Pet. App. 9a). As in *Namet,* however, the court "looked to the surrounding circumstances" (373 U.S. at 186), and concluded that there was no reversible error. The prosecutor had asked only five questions of Farley, none of which alluded to the guilt or innocence of any of the defendants. Moreover, the trial court gave a thorough cautionary instruction immediately at the conclusion of Farley's appearance. As this Court explained in *Namet* (373 U.S. at 187 (footnote omittted)), "even when * * * objectionable inferences might have been found prejudicial, it has been held that instructions to the jury to disregard them sufficiently cured the error."[3] The court of appeals, applying the same analysis as the Court in *Namet*, thus correctly concluded that Farley's invocation of the Fifth Amendment did not prejudice petitioner.

b. The court of appeals' decision is also not in conflict with this Court's decision in *Douglas* v. *Alabama, supra.* In *Douglas* the Court held that a defendant's Confrontation Clause rights had been violated when his co-defendant's confession was read aloud to the jury under the guise of cross-examining the co-defendant at trial. Because the co-defendant had asserted his Fifth Amendment rights

[3] See also *Richardson* v. *Marsh*, No. 85-1433 (Apr. 21, 1987), slip op. 6 (noting "the almost invariable assumption of the law that jurors follow their instructions"); *Spencer* v. *Texas*, 385 U.S. 554, 562 (1967); *Opper* v. *United States*, 348 U.S. 84, 95 (1954).



and refused to testify, Douglas was unable to challenge the truthfulness of the confession. In holding that the use of the co-defendant's confession in that manner violated Douglas's rights, the Court emphasized (380 U.S. at 417 (footnote omitted)) that the statements read to the witness by the prosecutor "recited in considerable detail the circumstances leading to and surrounding the alleged crime; of crucial importance, they named [Douglas] as the person who fired the blast which wounded the victim." In the present case, by contrast, the questions put to Farley were brief and did not bear directly on petitioner's guilt or innocence.[4]

2. Petitioner is on no sounder footing in contending (Pet. 13-17) that the court of appeals' decision in this case is in conflict with decisions of the Fifth, Eighth, and Ninth Circuits. Like the Sixth Circuit in this case, those courts "look[] to the surrounding circumstances in each case" (*Namet*, 373 U.S. at 186) in deciding whether a defendant has been prejudiced by questions put by a prosecutor to a witness who invokes his Fifth Amendment rights.

a. In *United States* v. *Jenkins,* 442 F.2d 429 (5th Cir. 1971), a prosecutor sought to call a witness who had stated, during a voir dire outside the jury's presence, that he would invoke his Fifth Amendment rights. As in the present case, the trial court permitted the witness to be

[4] Petitioner asserts (Pet. 12 (emphasis in original)) that in this case "the prosecution had no reason to require the witness to assert his Fifth Amendment privilege in front of the jury *other than* to create a clearly impermissible inference concerning the witness' guilt and, by implication, petitioner's guilt." The trial court, however, had a different view of the matter, ruling that the Farley examination could proceed, lest the jury " 'draw an inference and wonder what happened to Mr. Farley or somebody else' " (Pet. App. 8a (citation omitted)). While this may not be the preferred method for the government to avoid a "missing witness" instruction to the jury, it hardly amounts to "a conscious and flagrant attempt to build [the government's] case out of inferences arising from use of the testimonial privilege" (*Namet*, 373 U.S. at 186).

called because "the jury would expect to hear from [him]" (442 F.2d at 436). Affirming the defendant's conviction, the Fifth Circuit held (*ibid.*) that "[t]his one episode in the course of a very lengthy trial did not prejudice [the defendant]." The court observed that the witness had no special relationship to the defendant that would cause his claim of privilege to reflect adversely on the defendant. Moreover, the court pointed out (*ibid.*) that the trial judge had instructed the jurors "that they should not speculate on what any of the answers might be and that they should not infer any incrimination from the refusal to answer." Although the prosecutor knew that the witness would refuse to testify and called him only to allay the jury's possible concern about why the witness had not been called, the court found (*ibid.* (quoting *Namet*, 373 U.S. at 186)) "that the record does not support a claim that the prosecution called the * * * witness[] in a 'conscious and flagrant attempt to build its case out of inferences arising from use of the testimonial privilege.' "

The Fifth Circuit's analysis in *United States* v. *Ritz*, 548 F.2d 510 (1977), on which petitioner relies (Pet. 14-15), is not to the contrary. There, the government called a witness who was the husband of one defendant, the father of two others, and the father-in-law of a fourth, and questioned him at length on matters bearing directly on the various defendants. The government knew in advance that the witness would invoke the Fifth Amendment, and the witness did so in response to each material question. In reversing the defendants' convictions, the court of appeals noted (548 F.2d at 518) that, in light of the familial relationship between the witness and the defendants, "[i]t would be difficult to see how the average juror could fail to assume that the Government would not put on the witness" unless he had "some pretty strong evidence to help the Government's case." Moreover, because the witness's testimony was concededly "superfluous," the



court could find no purpose for calling him to the stand "other than * * * having the jury draw inferences from [his] refusal to answer the questions" (*id.* at 519). The court also noted (*id.* at 521) that the nature of the questions posed by the prosecutor suggested that the anticipated answer would most likely be assumed by the jury to be inculpatory. Thus, although on its particular facts the court of appeals reversed the convictions in *Ritz*, the approach that the Fifth Circuit took to the prosecutor's questions was no different from the approach taken by the court of appeals in the present case.

Petitioner claims (Pet. 14) that, unlike the court of appeals in the present case, the Fifth Circuit in *Ritz* gave "no weight to the government's interest in having a witness claim the privilege in open court." He quotes the portion of the *Ritz* opinion in which the court of appeals stated that it could find no purpose for calling the witness "other than that of having the jury draw inferences from [the witness's] refusal to answer the questions" (*ibid.* (quoting 548 F.2d at 519)). That passage, however, does not reflect any significant difference in approach between the two circuits. The Fifth Circuit reversed the convictions in *Ritz* because of the familial relationship between the witness and the defendants, and because of the incriminating subject matter of the prosecutor's questions. Although the court found no permissible basis for calling the witness, it did not suggest that the government is *never* justified in calling a witness who it expects will assert his Fifth Amendment privilege. In the *Jenkins* case, the Fifth Circuit implicitly disavowed any such per se rule. Moreover, the court of appeals in this case did not hold that the government was justified in calling Farley to the stand. Although the court noted that the district court had balanced the prejudicial impact of the procedure against what the district court regarded as its probative value, the court of appeals did not endorse the district court's conclu-

sion that the procedure had probative value in this case. Instead, the court of appeals simply concluded that on the facts of this case the procedure was not sufficiently prejudicial to justify reversal.[5]

b. Petitioner's reliance (Pet. 15) on *United States* v. *King*, 461 F.2d 53 (8th Cir. 1972), is also misplaced. In that case the prosecutor asked a series of questions to two witnesses who had invoked their Fifth Amendment rights. In reversing, the Eighth Circuit explained (461 F.2d at 57) that the questions asked were tantamount to "pointing a finger at [the defendant] and saying he did it." Here, by contrast, none of the prosecutor's questions implicated petitioner.[6]

c. The approach taken by the Ninth Circuit is also identical to that of the court of appeals in this case. In *United States* v. *Roselli*, 432 F.2d 879 (1970), cert. denied,

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[5] Citing a prior Sixth Circuit decision, the court of appeals noted that the government has been permitted in some instances to present a witness who it knows will invoke his Fifth Amendment privilege "where 'the prosecution's case would be seriously prejudiced by a failure to offer him as a witness' " (Pet. App. 9a (citation omitted)). At least in extreme cases, that principle is surely correct. If, for example, defense counsel suggests to the jury that a particular witness (who intends to invoke his Fifth Amendment privilege) has exculpatory evidence and that the government is preventing his testimony from being heard, and if in the judgment of the court a curative instruction would not be sufficient to overcome the prejudice to the government from defense counsel's argument, it may be appropriate for the government to be allowed to show the jury that the witness's decision not to testify is his own.

[6] See also *United States* v. *Kaminski*, 692 F.2d 505, 515 (8th Cir. 1982) (even if the question put to the witness—asking whether he had planned to assert a Fifth Amendment claim—were otherwise prejudicial to the defendant, "the instruction to the jury to disregard it sufficiently cured the error"); *Black* v. *Woods*, 651 F.2d 528 (8th Cir.), cert. denied, 454 U.S. 847 (1981) (question put to witness who invoked the Fifth Amendment was not prejudicial, where the episode occurred on the first day of a trial that lasted nearly two weeks).



401 U.S. 924 (1971), on which petitioner relies (Pet. 15-16), the court of appeals rejected the claim that the defendants were prejudiced when the government called to the stand a witness who had previously invoked his Fifth Amendment rights. In ruling against the suggestion of prosecutorial misconduct, the Ninth Circuit found no evidence that the government had "sought to draw from [the witness's] silence an inference favorable to its case." Like the Fifth Circuit in *Jenkins* and the court of appeals here, the court of appeals reasoned that the prosecutor had called the witness because of his "concern that unless the jury was advised of the reason for his failure to testify it might infer that his testimony would have been adverse to the Government's case" (432 F.2d at 903). Moreover, as in this case, the incident with the witness was brief, consuming only "a few moments in a six-month trial" (*ibid.*). Accord *Cota* v. *Eyman*, 453 F.2d 691, 695 (9th Cir. 1971), cert. denied, 406 U.S. 949 (1972).

d. At bottom, petitioner's claim of a conflict among the circuits reduces to the assertion that the court of appeals in the present case should have found the prosecutor's questions to be sufficiently prejudicial to call for reversal (see Pet. 16-17). Since the analysis undertaken by the court of appeals closely parallels that of the other circuits, this fact-bound challenge to the court's inquiry into the issue of prejudice warrants no further review.

## CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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# REPLY BRIEF

No. 87-148

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

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HOOVER LINDSEY,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

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## REPLY BRIEF OF PETITIONER

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## TABLE OF AUTHORITIES

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## REPLY BRIEF OF PETITIONER

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The United States, in its Opposition, characterizes petitioner's argument as a "fact-bound challenge" to the decision below. Br. in Opp. 7, 11. The government is simply wrong. Petitioner seeks review in this Court of a substantial and recurring constitutional issue, which was decided by the court of appeals in a way that contrasts sharply with the analyses adopted by this Court and followed by other courts of appeals.

1. At the outset, it is well to remember that the government purposefully called an alleged "co-conspirator" as a witness for the sole purpose of having him claim

his Fifth Amendment privilege in front of the jury. The government does not dispute that it knew in advance that the witness would not testify. In challenging this action, petitioner has not argued, as the United States suggests (Br. in Opp. 11), that the court of appeals erred in how it applied its balancing test in determining whether the government's practice was "sufficiently prejudicial." To the contrary, petitioner argued that this Court should grant this petition in order to determine whether the use of the Sixth Circuit's "balancing test" is ever a proper approach when the government forces an unindicted alleged co-conspirator to invoke his privilege against self-incrimination in the presence of the jury to avoid having a "missing witness."

In the petition, we demonstrated that this Court, in *Namet* v. *United States*, 373 U.S. 179 (1963) and *Douglas* v. *Alabama*, 380 U.S. 415 (1965), ever recognized that the forced invocation of the self-incrimination privilege produces (1) no testimony of any relevance and (2) creates a substantial risk of prejudice which cannot be cured through cross-examination. In applying the pertinent Sixth Amendment and evidentiary standards, the Court found reversible error in *Douglas*, but not in *Namet*. In *Namet*, "the witnesses provided relevant testimony which clearly outweighed their occasional claims of privilege" and defense counsel "failed to object on behalf of the defendant." Pet. 10; 373 U.S. at 189. In *Douglas*, by contrast, "the witness provided no relevant evidence and the defendant's inability to cross-examine was exacerbated by the prosecution's highly prejudicial use of the witness' prior statement." Pet. 10-11. Petitioner seeks review of the issue presented in this case—which "obviously lies between these two extremes"—and a determination whether the government may knowingly call a witness and place him before the jury for the *sole* purpose of showing that the witness is not "missing" by having him invoke his privilege against self-incrimination. Pet. 11. The Sixth Circuit's use of a "balancing test," to blink at the prosecution's severely



prejudicial conduct, conflicts with the principles laid down by this Court in *Namet* and *Douglas*. This conflict exists because the invocation of the privilege against self-incrimination has no legitimate probative value and there is always substantial prejudice when the sole purpose for calling a witness is to have the jury see the witness invoke his privilege against self-incrimination.

In response, the United States simply argues that both *Namet* and *Douglas* are distinguishable on their facts. Br. in Opp. 4-7. This observation adds nothing to what petitioner had already acknowledged (Pet. 11) and completely fails to address the conflict between the legal standards and principles applied by this Court in *Namet* and *Douglas* and the "balancing" test applied by the Sixth Circuit here. Indeed, in the final analysis, the United States does not dispute that forcing petitioner's "co-conspirator" to take the stand was both unnecessary [1] (*i.e.*, lacking in probative value) and prejudicial.[2]

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[1] In a considerable understatement, the United States concedes that forcing repeated invocation of the Fifth Amendment privilege in the presence of the jury "may not be the preferred method for the government to avoid a 'missing witness' instruction to the jury." Br. in Opp. 7, n.4. Indeed, several circuits explicitly have recognized that an appropriate instruction regarding the witness' absence fully protects the government without prejudicing the defendant. See *United States* v. *Maloney*, 262 F.2d 535, 537-38 (2d Cir. 1959); *Bowles* v. *United States*, 439 F.2d 536, 542 (D.C. Cir. 1970), *cert. denied*, 401 U.S. 955 (1971).

[2] To its credit, the United States does not suggest that this practice of forcing "co-conspirators" to invoke their rights against self-incrimination before the jury is not prejudicial to the defendants on trial. At best, the United States suggests that the use of this prejudicial inference should be accepted—even when it is absolutely unnecessary—as long as it is not "conscious" or "flagrant." Br. in Opp. 5, 7 n.4. But, like the Sixth Circuit's analysis, this approach ignores the defendant's rights.

The government does suggest repeatedly that the prejudice to petitioner was "cured" by an instruction to the jury. Br. in Opp. 3, 4, 6. However, it is doubtful whether the instruction given—"not [to] take the invocation of the Fifth Amendment by this witness in any fashion with respect to the guilt or innocence of any defendant

2. With respect to the inter-circuit conflict outlined in the petition (Pet. 13-17), the United States again asserts that the cases can be reconciled or distinguished on their facts. But, as we demonstrated in the petition, the analysis adopted by other courts of appeals, at least in the Fifth, Eighth and Ninth Circuits, is fundamentally at odds with the "balancing test" applied in the Sixth Circuit, and the outcome of this case would necessarily have been different if it had arisen in any of those circuits.

For example, the United States argues that the analysis in *United States* v. *Ritz*, 548 F.2d 510 (5th Cir. 1977), "was no different from the approach taken by the court of appeals in the present case." Br. in Opp. 9. The government argues that the conviction was reversed in *Ritz* because, unlike the present case, the "familial relationship" between the defendants and the witness and the "incriminating subject matter" of the questions was "sufficiently prejudicial to justify reversal." *Id.* at 9-10. But, even if the compelled exercise of the testimonial privilege in the *Ritz* case were "more prejudicial" than it was here,[3]

in this case"—was more curative than prejudicial, assuming that the jury was able to understand this comment. See Pet. 6, n.8. Moreover, even if the instruction had been clearer, it cannot be assumed that the damage caused by Farley's "testimony" could be undone. See *Cruz* v. *United States*, 107 S. Ct. 1714, 1717 (1987).

[3] It is not clear that the improper inferences in the *Ritz* case were "more prejudicial" than the inferences resulting from the assertion of the Fifth Amendment privilege by petitioner's alleged co-conspirator below. In fact, what is remarkable about the government's argument regarding prejudice is its complete silence concerning the lack of relevant evidence against petitioner in this case. Incredibly, in the government's own description of the conspiracy (Br. in Opp. 2), there is *no* mention of petitioner. The government thus implicitly concedes that the "evidence supporting petitioner's participation in the scheme to defraud was minimal" (Pet. 4) and that the most powerful "evidence" from which the jury could have drawn an inference of petitioner's guilt was the dramatic invocation of the privilege by John Farley, who was identified to the jury



the Fifth Circuit in *Ritz*—unlike the court below—also recognized that there is no evidentiary value in allowing the government to force witnesses to exercise their Fifth Amendment privilege in the presence of the jury. *Ritz*, 548 F.2d at 519; *San Fratello* v. *United States*, 340 F.2d 560, 565 (5th Cir. 1965). In short, although the United States might find the facts in some cases cited by petitioner to be more or less prejudicial to a particular defendant, the fact remains—and the government simply ignores it—that the courts of appeals have adopted varying legal standards that lead to different results when the government seeks to call as a witness a "co-conspirator" who will do nothing more than invoke his Fifth Amendment privilege before the jury. See *United States* v. *King*, 461 F.2d 53, 57 (8th Cir. 1972) (plain error for government to call witnesses for no purpose "other than forcing them to take the privilege in a manner obviously prejudicial to the defendant"); see also Pet. 6-7 (*quoting* Tr. Vol. IV, 140) (district court expressly recognized the conflict in the circuits, but allowed witness to testify under the Sixth Circuit standard).

3. Finally, the United States does not dispute that this petition raises an important and recurring constitutional and evidentiary issue. Indeed, the number of cases cited by both petitioner and the United States suggests the frequency with which this issue has arisen, as well as the variety of analyses undertaken in the courts of appeals.

as a "co-conspirator" and as petitioner's equivalent at another tire company involved in an identical scheme to defraud. See Pet. 4-5. In these circumstances, the government cannot credibly argue that the "inferences from [Farley's] refusal to answer" did not add "critical weight to the prosecution's case in a form not subject to cross-examination . . . ." *Namet*, 373 U.S. at 187.

The prejudicial inferences arising from the claim of privilege in this case are particularly objectionable because the prosecutor and district court had been informed unequivocally that Farley would invoke his Fifth Amendment rights if called to the witness stand. Pet. 5.

In fact, the situation addressed in the petition for certiorari—where the government places a witness before the jury for the sole purpose of requiring the witness to assert the privilege against self-incrimination—is so common that it is specifically addressed in the American Bar Association's Standards Relating to the Prosecution Function. Standard 3-5.7 provides that:

> A prosecutor should not call a witness who the prosecutor knows will claim a valid privilege not to testify for the purpose of impressing upon the jury the fact of the claim of privilege.

ABA Standards For Criminal Justice: Standards Relating to the Prosecution Function § 3-5.7(c) (1986). Petitioner does not mean to suggest that the government has acted unethically in its prosecution of this case.[4] To the contrary, given the conflict in the courts of appeals and the existing standard in the Sixth Circuit, the government may well have believed that it was perfectly acceptable to respond to the hypothetical "missing witness" problem by forcing the petitioner's alleged co-conspirator to invoke the Fifth Amendment privilege in the presence of the jury. Nevertheless, it is clear that (1) the witness' claim of privilege had no probative value; (2) it was wholly unnecessary (in light of available instructions to cure the "missing witness" inference); and (3) it created a highly prejudicial and improper inference against the petitioner. Moreover, that improper inference was not subject to cross-examination and therefore the practice violated the petitioner's rights under the Confrontation Clause of the Sixth Amendment and the Due Process Clause of the Fifth Amendment.

[4] The United States certainly is correct that only "conscious" and "flagrant" attempts to misuse the impermissible inferences, arising from a claim of testimonial privilege, give rise to a claim of prosecutorial misconduct mandating reversal. See *Namet*, 373 U.S. at 186. However, it is also true that the "prosecutor's good faith, or lack of it" is irrelevant in determining whether the Confrontation Clause is violated or whether the defendant is unduly prejudiced by the prosecutor's conduct. See *Frazier* v. *Cupp*, 394 U.S. 731, 736 (1969); *Robbins* v. *Small*, 371 F.2d 793, 795 (1st Cir.), *cert. denied*, 386 U.S. 1033 (1967). Thus, petitioner asks that certiorari be granted and this practice be reviewed by this Court, not as a question of prosecutorial ethics, but as a question of recurring prejudice to defendants and impairment of their Sixth Amendment right of confrontation.



* * * *

Under the government's reasoning and the decision below, the more important or "close" to the defendant a potential witness becomes at trial, the more reasonable it is for the government to compel the witness to take the stand lest the "missing" witness' absence be noticed by the jury.[5] However, as this case demonstrates, the closer a witness is to the defendant, the greater the prejudicial inference drawn from the witness' invocation of the privilege. Thus, unless the issue is reviewed by this Court, the prejudice inflicted on this petitioner will recur in future cases. This case presents a perfect vehicle in which to resolve the basic issue of whether the purposeful use of a co-conspirator's invocation of his privilege against self-incrimination before the jury is a permissible practice. Accordingly this Court should grant the petition in order to resolve the conflicting approaches of the courts of appeals on this issue and to reaffirm the basic framework established by this Court in *Namet* and *Douglas*.

[5] Of course, the premise of the government's argument requires that the courts ignore the availability of an instruction to cure the missing witness inference. Pet. 12, n.14.

## CONCLUSION

For the foregoing reasons and those presented in the petition, the petition for a writ of certiorari should be granted.

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September 29, 1987

# OPINION

# SUPREME COURT OF THE UNITED STATES

## HOOVER LINDSEY *v.* UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 87-148. Decided November 2, 1987

The petition for a writ of certiorari is denied.

JUSTICE WHITE, with whom JUSTICE BRENNAN joins, dissenting.

The issue here is whether a defendant's rights under the Due Process and Confrontation Clauses are violated when the government forces a witness to take the stand solely to invoke his privilege against self-incrimination in front of the jury even though the government already knew that the witness would refuse to testify. In this case, petitioner was convicted of mail fraud. At the trial, the government called as a witness an unindicted co-conspirator who was alleged to have engaged in the same kind of conduct for which petitioner was indicted. The witness's attorney informed the prosecutor and the court that his client would invoke the privilege if he were called to testify, and the witness did invoke the privilege when he was called outside the presence of the jury. When the jury returned, the prosecution called the witness and he was permitted to testify after the trial court overruled petitioner's objection. Once again, after stating his name and place of residence, the witness invoked the Fifth Amendment privilege and refused to testify in response to five different questions. On appeal, a panel of the Sixth Circuit noted that this practice is "'so imbued with the potential for unfair prejudice that a trial judge should closely scrutinize any such request.'" *United States* v. *Lewis*, Nos. 86-5377 and 86-5379 (Apr. 17, 1987), App. to Petition for Writ of Certiorari 9a (quoting *United States* v. *Vandetti*, 623 F. 2d 1144, 1147 (CA6 1980)). Nonetheless, it held that the trial court did not commit reversible error when it permitted the witness to testify and gave a cautionary instruc-

tion to the jury not to consider the witness's actions as bearing on the guilt or innocence of any of the defendants. *Ibid.* The position of the Sixth Circuit, which is consistent with that of a number of the Circuits, conflicts with the position of at least two other Circuits. *United States* v. *King*, 461 F. 2d 53, 57 and n. 4 (CA8 1972) (calling a witness in these circumstances, where no useful purpose would be served, was error notwithstanding that a curative instruction was given); *United States* v. *Roselli*, 432 F. 2d 879 (CA9 1970) (disapproving the calling of a witness before the jury after he has indicated that he will decline to testify, though the error did not prejudice the defendant where it was a momentary episode in a six-month trial), cert. denied, 401 U. S. 924 (1971). See also *United States* v. *Ritz*, 548 F. 2d 510 (CA5 1977). The split among the Circuits on this issue warrants our granting certiorari.